Eastern Food Service, Inc. d/b/a Stewart Sandwich Service *and* United Food & Commercial Workers Union, Local 1459, AFL-CIO. Case 1-CA-17334

March 10, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 9, 1981, Administrative Law Judge James L. Rose issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and counsel for the General Counsel also filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

The General Counsel excepts to the Administrative Law Judge's dismissal of the allegation that Respondent violated Section 8(a)(1) of the Act by Vice President Elliot Levy's solicitation of grievances from route salesman Francis Reilly on March 11, 1980. As found by the Administrative Law Judge, the facts show that Respondent voluntarily recognized the Charging Party Union as collective-bargaining representative of its route salesmen and freezermen on March 10, 1980. On the following day, Reilly was summoned into Levy's office and asked "what his grievances were." In response to Levy's questioning, Reilly discussed his grievances and his reasons for joining other employees seeking union representation.

We agree with the General Counsel's contention that Levy's solicitation of grievances, at a time when recognition had been extended to the Union as the unit employees' bargaining representative, improperly bypassed the Union in its role as bargaining representative, and constituted unlawful direct dealing with a unit employee.[1] Accordingly, we find that by the foregoing conduct Respondent violated Section 8(a)(1) of the Act, and we shall order Respondent to cease and desist from such conduct.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its order the recommended Order of the Administrative Law Judge as modified below and hereby orders that the Respondent, Eastern Food Service, Inc. d/b/a Stewart Sandwich Service, Springfield, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following paragraph 1(b) and reletter the subsequent paragraph accordingly:

"(b) Soliciting grievances directly from our employees in derogation of their right to be represented by the Union for the purposes of collective bargaining."

2. Substitute the attached notice for that of the Administrative Law Judge.

MEMBER JENKINS, dissenting in part:

I do not agree that Respondent improperly bypassed, or attempted to bypass, the Union the day after voluntarily recognizing it by asking driver Reilly "what his grievances were." The record clearly shows that Respondent has a history of inquiring of its drivers concerning any "problems" they were having on the job. My colleagues have found, in substance, that the substitution of the word "grievance" for "problems" somehow deviated from that history and thus undercut the Union. Both words, however, are generic in sense and meaning; both concern job-related matters. On its face, therefore, the inquiry seems to be nothing more than a continuation of an existing practice, and my colleagues have not shown how this inquiry differed materially from the types of inquiries the Employer previously had made. Moreover, considering Respondent's voluntary recognition of the Union just the day before the inquiry was posed, it seems incongruous to conclude that Respondent bypassed the Union in order to avoid dealing with it, or that, in these circumstances, the inquiry would tend to interfere with Reilly's, or any other employee's, Section 7 rights.

[1] In response to our dissenting colleague we find it only necessary to note that (1) Respondent never bargained with the Union and in fact later withdrew recognition; and (2) the conversation was union oriented since Levy asked Reilly why he signed a card and they discussed why the employees wanted the Union. We deem it irrelevant whether or not this conversation was "anti-union" and have not, as the dissent mistakenly suggests, so characterized it. We deem it equally irrelevant that the conversation did not occur in an "environment of union hostility." This conversation touched on matters properly entrusted to the Union as the lawfully recognized collective-bargaining representative of all unit employees, including Reilly, and constituted the only "bargaining" engaged in by Respondent even though it has had an obligation to bargain with the Union since the day prior to the conversation. Following recognition, an employer is no more privileged to continue a past practice of soliciting grievances directly from employees than he is to grant them unilateral wage increases consistent with past practice.

It seems equally incongruous for the majority to cast Respondent in an antiunion mold merely by labeling Levy's conversation with Reilly "union oriented" and by relying on the events totally unconnected with Levy and Reilly. I agree that their conversation was union oriented. Unlike my colleagues, however, I cannot, in the circumstances present here, equate "union oriented" with antiunion. Had the conversation occurred during an organizing campaign or in an environment of union hostility, the majority's observation might be well founded. But here, precisely the opposite climate prevailed, and my colleagues have presented neither reason nor evidence to support the inference drawn by them that the conversation was inhibitive, or coercive, or that it otherwise interfered with Reilly's desire to obtain the union representation which Respondent voluntarily accepted in his behalf. As the Administrative Law Judge noted, what could be more natural at this time than that "a conversation along those lines would take place." My colleagues' conclusion that Respondent's past practice is outlawed by its recognition of the Union is, I fear, no more substantial than their comparison of that practice with a unilateral wage grant. Suffice to say that recognition does not *ipso facto* render all past practices invalid.

While it is true, as the majority notes, that "Respondent never bargained with the Union and in fact later withdrew recognition," the context of the situation does not lend support to my colleagues' position. I cannot find any nexus whatsoever between those subsequent events, which clearly were unlawful, and any of Respondent's prior conduct, and the majority has supplied none.

I would therefore dismiss this portion of the complaint.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT refuse to recognize and bargain with United Food & Commercial Workers Union, Local 1459, AFL-CIO, as the exclusive representative of the employees in the unit described below.

WE WILL NOT solicit grievances from our employees in derogation of their right to be represented by the above-named Union for the purpose of collective bargaining.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize and bargain with the above-named Union as the exclusive representative of all employees in the bargaining unit described below, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full-time employees, including route salesmen and freezermen, employed by us at our West Springfield, Massachusetts, facility, excluding office clerical employees, company officers, sales manager, confidential employees, professional employees, guards and supervisors as defined in the Act.

EASTERN FOOD SERVICE, INC. D/B/A STEWART SANDWICH SERVICE

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge: This matter was heard before me on December 4, 1980,[1] in Springfield, Massachusetts, on the General Counsel's complaint which principally alleges that the Respondent withdrew recognition from the Charging Party in violation of Section 8(a)(5) of the National Labor Relations Act, as amended, 29 U.S.C. 151, *et seq.* A violation of Section 8(a)(1) is also alleged.

The Respondent generally denies that it engaged in any unfair labor practices and affirmatively contends that the Union's claim of majority status was tainted by the fact that two supervisors within the meaning of Section 2(11) of the Act signed authorization cards and participated in the organizational campaign. Hence the withdrawal of recognition was not unlawful.

[1] All dates are in 1980.

Upon the record as a whole,[2] including my observation of the witnesses, the briefs, and the arguments of counsel, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

The Respondent is a franchise distributor of Stewart sandwiches doing business in New Hampshire, Vermont, and western Massachusetts. Its principal office is located in Springfield, Massachusetts. In the course and conduct of its business, the Respondent annually sells and ships from its Springfield facility frozen foods and related products valued in excess of $50,000 directly to points outside the Commonwealth of Massachusetts. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Charging Party, United Food & Commercial Workers Union, Local 1459, AFL-CIO (herein called the Union), is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The largely undisputed facts show that during all times material herein (late February to mid-March) the Respondent employed six route salesmen (or drivers), two individuals designated as "route supervisors," a freezerman, a sales manager, and an office clerical employee. In addition, Bernard Levy, the owner and president of the Respondent, and his son Elliott participated in the day-to-day operations.

The General Counsel contends that the appropriate bargaining unit includes the six drivers, the two route supervisors, and the freezerman. The Respondent contends that the two route supervisors should be excluded because they were supervisors within the meaning of Section 2(11) of the Act.

On February 22, some of the employees met and discussed the possibility of joining a union. One of the participants in this meeting was Phillip Martell, one of the route supervisors. He told employees, among other things, that they needed a union inasmuch as Elliott Levy intended to fire a couple of the drivers. Indeed, he told the others that he had talked Levy out of taking such action at the time.

Then on February 29, employees met again, this time with Scott Macey, the vice president of the Union. At this meeting four of the drivers and the two route supervisors, Martell and Richard Wright, signed authorization cards. A few days later another driver and Gary Forte, a part-time "freezer" employee, signed authorization cards.

On March 10, Macey and Union President Richard Abdow went to the Company's facility about 6 a.m. for the purpose of demanding recognition. First Abdow met with Bernard and Elliott Leyy, and then shortly thereafter Macey joined them. Abdow announced that the Union represented a majority of the employees, demanded recognition, and stated that he was prepared to picket for recognition. After some discussion, it was agreed to exclude the office clerical employees and Forte from the unit because Forte was a part-time employee who was soon to enter Coast Guard.

Bernard asked why Route Supervisor Wright was outside with the drivers, and Abdow answered that he was there because "he wanted to be." Beyond this, neither Bernard nor Elliott Levy raised any question that the route supervisors should not be included in the bargaining unit.

Following an examination of the authorization cards, Elliott Levy acknowledged that the Union had demonstrated that it represented a majority of the employees in a bargaining unit described as:

> All full-time employees employed by the Employer, Stewart Sandwich Service located at 23 Newburg Street, West Springfield, Massachusetts, excluding office employees, company officers, sales manager, confidential employees, guards and supervisors within the meaning of the Labor Management Relations Act of 1947 as amended.

Bernard Levy signed a "Certification of Results of Card Check" and a "Recognition Agreement" whereby the Respondent agreed to recognize the Union as the exclusive collective-bargaining representative of the employees in the defined unit and certified that the Union had presented credible evidence of its majority status.

On March 24, Bernard Levy wrote the Union withdrawing recognition claiming "that the authorization cards previously show [sic] to us were tainted by the active participation of our supervisors," presumably referring to Martell and Wright. Thereafter, the Respondent has refused to recognize and bargain with the Union.

B. *Analysis and Concluding Findings*

1. The refusal to bargain

The principal issue in this matter is whether Martell and Wright were in fact supervisors within the meaning of Section 2(11) of the Act; and, if so, whether their participation in the two meetings of employees and their signing authorization cards so tainted the Union's status as the majority representative of employees that the Respondent was justified in withdrawing the recognition it had accorded the Union.

Although there are indicators that they were employees (the low supervisor-to-employee ratio, the same holidays and vacation as others, the fact that they occasionally did unit work), I conclude that Martell and Wright were supervisors within the meaning of the Act.

First, they were both told that they were supervisors and they considered themselves as such. Although their authority was not defined to them by Elliott Levy in statutory terms, it is clear that Levy told both that they would be in charge of the drivers, would train new drivers, and would be expected to go with the drivers on a periodic basis to see how they were performing their

[2] The Respondent's motion to correct the transcript is granted.

duties. In this respect, the supervisors set their individual schedules. Both Martell and Wright recommended the discharge of employees after such observations and the employees were discharged. They would occasionally exercise judgment concerning which route to assign a new customer.

Elliott Levy testified that he has not been on a route either as a driver or an observer for at least 10 years and his father has not done so for at least 20 years. If Wright and Martell were not supervisors, such would mean that there was no supervision of the drivers on their routes. While the nature of this business dictates that employees have more autonomy in their daily routine than production employees in an industrial setting, a total absence of supervision would not be normal. I believe that the duties of Wright and Martell did involve some supervision of the drivers.

Both Wright and Martell were salaried employees, Martell being paid $300 weekly and Wright $270. Both received a portion of the commission for any new sales they effectively participated in consummating, although most of the new sales were made by the drivers. Drivers were on a $150-per-week guarantee plus a commission of 3 percent of sales which meant that their average salary was about $240 a week.

Wright and Martell had keys to the plant and were responsible for opening the facility each morning. They would alternate this duty, according to Martell's testimony, as well as going out on overnight runs with the drivers. When Martell and Wright were out with the drivers, they were expected to write reports to Levy concerning their observations, and they did.

In May 1978 Martell was promoted to the position of route supervisor from that of route salesman. Subsequently, on Martell's recommendation, Wright was similarly promoted. At the time of his promotion, according to Martell, he was told by Elliott Levy, "I'd like to have you take over the men. You run the men."

Martell testified that, while he did fill in for absent drivers occasionally, such amounted to only about 3 days a month—normally Mondays. The rest of his time was spent on routes with drivers observing their performance, and making calls on potential customers. From Martell's testimony, it appears that the amount of actual driver work performed by the route supervisors was minimal. Given that the primary function of Wright and Martell was to observe and make reports concerning how the driver salesmen performed their jobs, and that both Martell and Wright did make effective recommendations concerning the job tenure of employees, I must conclude that they had the authority set forth in Section 2(11) of the Act. They were supervisors and therefore should have been excluded from the bargaining unit.

Thus, I conclude that the appropriate bargaining unit within the meaning of Section 9(b) of the Act is:

> All full-time employees, including route salesmen, and freezermen[3] employed by the Respondent at its West Springfield, Massachusetts, facility, excluding office clerical employees, company officers, sales manager, confidential employees, professional employees, guards and supervisors as defined in the Act.

However, I do not believe that the mere fact that these individuals were present and spoke at the two meetings of employees and signed cards tainted the authorizations signed by the others.

While there was some question concerning whether Martell was management, Macey said he was not, "in the eyes of the Union." Though Macey's judgment is irrelevant to the issue of Martell's actual status, such does tend to show that employees were not misled into believing that management personnel were pushing the Union's organizational campaign. Nor could any of Martell's statements be construed by employees that the Company wanted the employees to organize.

Beyond that, there is no evidence that Wright or Martell actually solicited employees to sign authorization cards or that they were, in any other manner, instrumental in the development of the Union's status as majority representative. It appears that they were simply present at the meeting, with Martell making some statements on February 22 about Elliott Levy's plans and expressing general approval of organizing. The mere fact that low-level supervisors, who subsequently are found by the Board to possess sufficient authority to exclude them from the bargaining unit, may have signed authorization cards does not so affect the situation as to conclude that the other employees thereby lost their right to designate the Union as their representative. See *Sourdough Sales, Inc., d/b/a Kut Rate Kid and Shop Kwik*, 246 NLRB 106 (1979), quoting Administrative Law Judge Arthur Leff in *Orlando Paper Co., Inc.*, 197 NLRB 380, 387 (1972):

> Board precedents reflect that the Board will not invalidate designation cards for supervisory taint unless it is affirmatively established as a minimum, either that the participation of the supervisory personnel in the organizational campaign was of such a kind as to have implied to the employees signing the cards that their employer favored the union, or that there is a reasonable basis for believing that the employees whose cards are sought to be invalidated were coercively induced to designate the Union through fear of supervisory retaliation. . . .

And it is clear that, subtracting Martell's and Wright's cards from the total, the Union nevertheless still represented a majority of the employees in an appropriate unit (5 of 7), which the Company recognized following its inspection of the authorization cards. The parties stipulated that on March 10 there were six route salesmen, two route supervisors, and a freezerman. Offered in evidence were authorization cards signed by five of the route salesmen. Further, on the morning of March 10, all the employees remained outside pending negotiation of the recognition agreement.

Although influenced, perhaps, by the prospect of picketing, nevertheless the Respondent did accept the author-

[3] While Forte identified his job as "freezer," there apparently was a full-time freezerman.

ization cards as determinative of the employees' wish to be represented by the Union. The scope of the bargaining unit was negotiated, and a recognition agreement signed. Whatever the legal sufficiency had the Respondent refused to recognize the Union given the participation of Wright and Martell, it did not do so. A bargaining relationship voluntarily established is irrebutably presumed to continue for a reasonable time and withdrawal of such recognition is violative of Section 8(a)(5). See *Laclede Cab Company, d/b/a Dollar Rent-A-Car*, 236 NLRB 206 (1978), and cases cited therein. Absent facts showing that the employees' choice was not free, I conclude that the Respondent's obligation to bargain with the Union was set on March 10, 1980.

Accordingly, I conclude that in withdrawing recognition on March 24, the Respondent violated Section 8(a)(5) of the Act.

2. The 8(a)(1) violation

On March 11, the day after the Company granted recognition to the Union, Francis Reilly, one of the drivers, was called into Elliott Levy's office and Levy asked "what his grievances were." During the course of this conversation Levy also asked him what his reasons were for signing the authorization card. While Levy admits to having talked to Reilly on March 11, he contends that he did not use the word grievance but merely asked Reilly what his "problems" were.

This conversation is alleged by the General Counsel to have contained a solicitation of grievances with promises of increased benefits and improved terms and conditions of employees.

There is nothing in Reilly's testimony to suggest that Levy made any promise of benefits to him in order to discourage his union activity. Nor does it appear that Levy said anything more to Reilly than normal between the employer of a small company and an employee. Indeed, Reilly testified on direct examination: "Well, frequently, he'd [Elliott Levy] ask if there were any problems on my route. How things are going? You know, something like that." Coming the day after the confrontation with the Union and the Company's signing the recognition agreement, it appears natural that a conversation along these lines would take place. I do not, however, believe that Elliott Levy solicited grievances or promised their favorable resolution in order to discourage Reilly or other employees' union activity. The Company, after all, had already agreed to recognize the Union. Nor do I believe that the General Counsel has otherwise established that the Respondent, through Levy at this time, interfered with the employees' Section 7 rights. I therefore conclude that this allegation of the complaint should be dismissed.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICE UPON COMMERCE

The unfair labor practice found above, occurring in connection with the Respondent's business, has a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tends to lead to labor disputes burdening and obstructing commerce within the meaning of Section 2(6) and (7) of the Act.

V. THE REMEDY

Having found that the Respondent has refused to bargain with the Union as the duly designated representative of its employees in a unit appropriate for bargaining within the meaning of Section 9(b) of the Act, I will order that it cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

Upon the foregoing findings of fact and conclusions of law, the entire record in this matter, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[4]

The Respondent, Eastern Food Service, Inc., d/b/a Stewart Sandwich Service, Springfield, Massachusetts, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain with the Union as the duly designated representative of a majority of its employees in the unit described above.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action:

(a) Recognize and, if so requested by the Union, bargain with it as the duly designated representative of the majority of its employees in the above-described bargaining unit and reduce any agreement reached to a written, executed contract.

(b) Post at its Springfield, Massachusetts, facility copies of the attached notice marked "Appendix A."[5] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

The complaint in all respects not specifically found herein is dismissed.

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[4] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."